STUDIES IN ENGLISH CIVIL PROCEDURE.—III. THE COUNTY COURTS.*

III. Intercurial Relations.

In Section I the main outlines of county court procedure were traced. It is now proposed to specify details which differ markedly from the usual American procedure, leaving it to the reader to decide whether any of them could be adopted without adopting the distinctive county court machinery through which they work. The first group of these is drawn from the relationship of each county court district to the other county courts in the system or to the High Court.

1. The plaintiff may enter his plaint in the court of the district where any one of the defendants dwells or does business, or has done so within six months; but further, he may enter it in the court of the district where the cause of action or claim wholly or in part arose.[77] An American observer must erase from his mind memories of jurisdiction obtained by service upon a defendant effected within the geographical limits of the district of a court; in England the place where service is effected is immaterial as will be explained in the succeeding paragraphs; the important thing is that the defendant dwell or do business, or have done so recently, within the district, or that the cause of action arise there. The last of these clauses is the most novel to American ideas. It is not by any means novel, however, in England as it is reproduced from the practice of the old county courts and courts of request which were superseded by the Act of 1846.[78] In that, the first County Courts Act, there was a clause permitting a plaint to be entered in any court when the cause of action arose within its district,[79] and under that section it was early held that the jurisdiction vested only when the

*Continued from the February number, 64 Univ. of Penna. L. Rev. 357.

[77] Sec. 74, Act of 1888.

[78] 9 and 10 Vict. c. 95.

[79] Sec. 60.

whole cause of action arose within the district;[80] but in the Act of 1867 the words were altered to bestow the jurisdiction when "the whole or a part" of the cause of action there arose,[81] and the present Act continues that wording. It has been held under the later phrase that it must be a *material* part of the cause of action to give rise to the jurisdiction. It is not surprising that these clauses have been the occasion for much metaphysical reasoning in the decisions, not only upon *lex loci contractus,* but upon the material and immaterial parts of a cause of action. In actions arising out of torts or out of claims to land or chattels, there is no difficulty. But in actions for breaches of contract there are opportunities for fine-spun logic when one attempts to give a contract a local habitation as well as a name. It is now well understood however that giving an order, making an offer, giving an acceptance of an offer, delivering the goods ordered, or paying for the goods, are all material parts of a cause of action sufficient to establish the jurisdiction.

In practice the failure of a purchaser to pay for goods is the almost universal reason why plaints are entered, and it is the custom for wholesale dealers or manufacturers who have customers all over England to enter their plaints in the court of the district where their head office or factory is situated. Their allegation usually is that, "no other place of payment having been arranged," the place of payment is the vendor's office, so that the failure to pay "within the district" gave rise there to a cause of action.[82] Or they frequently allege that, the order for the goods having been received at the head office, a material part of the cause of action arose thereby within the district. By this means customers who refuse or fail to pay can be sued, no matter where they reside, in the court of the vendor's district, and in all the large London courts a tremendous number of plaints is entered for this purpose against defendants who reside at a distance. This is undoubtedly a great convenience for the plain-

[80] Because that had been the practice in the old local courts.

[81] 30 and 31 Vict. c. 142, sec. 1.

[82] This grew out of the "Bath stone decision"; Northey v. Gidney (1894), 1 Q. B. 99.

tiffs; is it a hardship upon defendants? It can hardly be said to be. In the first place, these actions are seldom seriously defended. What happens in the average case is that the defendant either allows judgment to go by default, after being served with a default summons, or, before the hearing day, writes a letter to the registrar confessing the debt, complaining about hard times or bad luck, and suggesting payment by small instalments. At the hearing the defendant does not appear but the registrar reads his letter to the plaintiff's clerk or manager who has come to prove the debt and gives judgment for payment by such instalments as the plaintiff is willing to accept. Firms which carry large numbers of small accounts often do not even employ a solicitor to enter the plaints, as the procedure is perfectly simple. But sometimes a customer has some just cause of complaint, and then he will not only give notice of defense, but he will come up to town for the hearing with a solicitor to support him; in such a case the plaintiff stands to lose heavily, as if judgment goes against him he must pay the defendant's costs. On the whole therefore the procedure is used by plaintiffs only in proper cases, and saves much needless expense that might be incurred in engaging a solicitor in the defendant's town. Any defendant who resides more than twenty miles from the trial court may, by sending to the registrar an affidavit disclosing a good defense upon the merits, obtain an order requiring the plaintiff to give security for costs,[83] and this covers the defendant in any doubtful case. In some courts these orders are very frequently applied for.

Another safeguard is that leave of the court is required in any case where the defendant is not actually residing or doing business within the district. This is obtained by filing with the registrar an affidavit stating the facts relied upon and showing a good cause of action;[84] the affidavit may be sworn in the court office, where no fee is charged for it and where the plaintiff may obtain assistance in filling out the printed form. Leave is usually granted, but in a proper case the registrar would exercise

[83] O. 12 r. 9.
[84] O. 5 r. 13.

his right to refuse it; as, for instance, where he thought the plaintiff could not pay costs, or where there has been an assignment of the claim making the proposed place of trial less convenient to the defendant, and especially where the defendant is a working man for whom it would be more convenient to defend the action in his home court.[85]

In respect to the ten county court districts within the London metropolitan area it is specially enacted that if both plaintiff and defendant reside within the general area, then the plaint may be entered in either the plaintiff's district or the defendant's, as the plaintiff chooses.[86]

2. In any case where a defendant resides or does business out of the district in which he is sued the summons will be sent by mail by the registrar of the "home district" (where the plaint was entered) to the high bailiff of the "foreign district" (where the defendant is to be found), with instructions for serving it. Such service is "as valid as if the same had been made by the bailiff of the court out of which such summons or other process shall have issued within the jurisdiction of the court for which he acts."[87] At least eight clear days before the return day, the high bailiff of the foreign district must transmit to the registrar of the home district the copy of the summons, with a return of service duly endorsed; or in case of failure to effect service he must return the summons itself.[88] If the high bailiff of the foreign court neglects to transmit this return of service promptly he may be ordered by the judge of the home district to pay to the plaintiff such sum as the judge may consider reasonable as compensation for any loss of time and expense which may have been caused to the plaintiff by such neglect.[89]

3. It is also possible, conversely, for a plaintiff to enter a plaint in a district where he himself does not reside or do busi-

[85] O. 5 r. 13.

[86] Section 84, Act of 1888. This includes the county courts of the City of London, Bloomsbury, Brompton, Clerkenwell, Lambeth, Marylebone, Shoreditch, Southwark, Westminster and Whitechapel.

[87] Section 76, Act of 1888.

[88] O. 2 r. 27.

[89] O. 2 r. 29.

ness, without going there to do it. He may prepare all the papers necessary—his praecipe, particulars if required, affidavits where leave is necessary—and transmit them by mail to the registrar of the court where he wishes to sue, together with a money order for the fees payable, and a stamped envelope for reply.[90] The registrar will then return to the plaintiff the plaint note mentioned in Section I and if the plaintiff is permited to serve the summons himself, the summons, although that will usually be served by the high bailiff of the distant court. The ten courts in the London metropolitan area are treated, *inter se,* as one district, for the purposes of this rule.

The rule does not give a plaintiff an absolute right to enter a plaint by mail in his own district, but that is very frequently allowed by registrars nevertheless. In London, for instance, large firms will enter a batch of forty or fifty plaints at one time. If these are sent by mail the court office can enter them and prepare the necessary papers at its leisure; if they are brought in by a clerk the office is swamped and other suitors are kept waiting; many registrars are not averse therefore to allowing the extension of the rule. Some object to it because it means extra expense in cases where some necessary affidavit or other paper has been omitted, whereas if a clerk came with the plaint he could be told to go back and fetch it.

This facility is of great value to plaintiffs as it covers all cases where the defendant resides in a foreign district or where the action can be more conveniently tried there. Its use is frequent in the case, for instance, of a business house having a large number of customers in another town; much time and trouble are saved by suing directly in the other town, instead of through the creditor's home court. Here again it must be remembered how large a proportion of county court actions are not defended. If, however, there is a defense offered the plaintiff may prepare for the hearing by mail; he may instruct the registrar by mail to issue subpoenas to witnesses for service by the high bailiff or by a solicitor.[91] At the hearing itself the

[90] O. 5 r. 12.
[91] O. 18 r. 3 a.

plaintiff must attend either in person or by some agent who can be sworn to prove the debt and give further evidence.

There are further provisions enabling such a plaintiff to enforce the claim in a distant court. If money is paid into the court where he sues, then upon sending in his plaint note the registrar will transmit to him the sum by mail;[92] and the general rule, whether the plaintiff resides in or out of the court district, requires the registrar to notify the plaintiff each time an instalment is paid of over ten shillings.[93] If the judgment debtor fails to pay as ordered, and the creditor desires to levy execution, he can send his praecipe for the warrant of execution, together with his plaint note and the necessary fees by mail to the distant registrar. Thereupon the registrar will issue the warrant and have it executed through the bailiffs of the court.[94] There are certain special cases in which the leave of the court is a prerequisite to execution;[95] to cover them, or indeed any other case in which the plaintiff wishes to know how the record stands, the registrar is required, upon the plaintiff's request, to forward "such information as he may ask for, to enable him to ascertain whether execution may be issued."[96] It will be remembered that all sums paid by judgment debtors must be paid into court and the fruits of the execution reach the creditor through the same channel.

Similarly, if the creditor feels he can more successfully proceed by judgment summons than by execution,[97] he may send his praecipe, plaint note and fee, by mail and have the summons issued and served by the local bailiffs.[98] At the hearing of this

[92] O. 9 r. 22.

[93] O. 23 r. 13.

[94] O. 25 r. 10 b.

[95] As, for instance, where there is a judgment summons or an order of attachment outstanding (O. 25 r. 11 a); or where any change has taken place after judgment, by default, assignment or otherwise (O. 25 r. 14); or where, judgment being against a firm, execution is sought to be levied upon some person who does not appear upon the record as a partner (O. 25 r. 11).

[96] O. 25 r. 10 b (2).

[97] As explained in Sec. I, a judgment summons, which alleges that a judgment debtor has the means to pay but has failed to do so, is an order upon him that he appear and show cause why he should not be committed to prison for contempt of court in refusing to pay.

[98] O. 25 r. 30 a.

summons the plaintiff must be represented. But if an order for commitment is made, with the usual suspension conditional upon payments by the debtor, then if the debtor still fails to pay and the plaintiff wishes to proceed to actual commitment, he can sue out the warrant by mail by forwarding to the registrar the necessary praecipe and fees.[99] These rules are all in very frequent use.

4. Next in order are rules which enable a judgment creditor in any district to enforce his judgment in any *other* district where the defendant is or has property. The preceding paragraphs refer to the case where the whole action is conducted in the district where execution is levied; this, however, to the levying of execution in a district other than that in which judgment was rendered. This is a complete innovation upon the powers of the courts at common law, introduced by the Act of 1846[100] and continued in the present act.[101] The procedure is simple. The plaintiff in his praecipe to the home registrar for the warrant of execution states that the defendant's goods are in another district named; the home registrar issues the warrant as usual to the home high bailiff; who must then send it by mail to the registrar of the other district with a request for its execution. The foreign registrar re-seals the warrant with the seal of his own court, and it is served by the foreign bailiffs. Any money recovered by the high bailiff of the foreign court, either before or after sale, must be turned over by him to the registrar of the foreign court within twenty-four hours;[102] a return stating the net amount made (less charges), certified by the foreign registrar, must then be transmitted by the foreign high bailiff to the registrar of the home court; and thereupon the home registrar will pay to the creditor out of the funds of the court, the sum

[99] O. 25 r. 47 a.

[100] Section 104. It had long been asked for. In Anderson's "Law and Practice of County Courts" (York, 1830), appears this footnote to the statement, "The sheriff's warrant of *levari facias* cannot be executed upon goods and chattels out of his county": "This is an evil which ought not to be suffered to exist."

[102] As pointed out in Section II the offices of High Bailiff and Registrar are filled by the same person in all but sixty-seven of the four hundred and ninety-four courts.

[101] Section 158, Act of 1888.

so certified.[103] That sum is credited to the home court in the annual Treasury Audit, so that no money actually moves from one district to another in the process. This is a very common proceeding, and large amounts are constantly being so collected.

Even wider powers are created by the Inferior Courts Judgments Extension Act, 1882,[104] which makes it possible for any English, Irish or Scotch inferior court judgment to be executed in any of the three kingdoms, upon a certificate of the judgment being registered in the local court of the district where it is sought to levy execution.[105] This is an extension to the lower courts of the law adopted for the superior courts for the same purpose—the Judgments Extension Act of 1868.[106]

Together with these provisions must be considered the rule which permits warrants of execution against goods to be issued concurrently in more than one district, although in fact the rule is not often invoked.[107] Judgment summonses as well as executions may be proceeded upon in a district other than that in which the judgment was rendered, the procedure being the same as with executions.

5. There are several cases in which actions can be transferred to or from county courts, which may be considered next. First, if it develops that an action begun in a county court can be more fairly or conveniently tried in the country court of another district, the judge must send it for hearing to such other court, and the registrar must transmit by mail a certified copy of all the proceedings.[108] This is a useful rule to have in reserve, although it is not often called into use.[109]

[103] O. 28 r. 2. Various rules require the home high bailiff to notify the foreign high bailiff if any payment or other step has been made by reason of which the execution must be stayed.

[104] 45 and 46 Vict. c. 31.

[105] In English courts regulated by O. 45 of the county court rules.

[106] 31 and 32 Vict. c. 54. In this connection it might also be well to call attention to a similar law in the Australian Federation, the Service and Execution of Process Acts, 1901-1912, Sessional Acts, Vol. XI, 1912, which make it possible to serve the legal process of any state in the Federation in any other state, under rules to be provided for that purpose by the Supreme Court in each state.

[107] O. 25 r. 18. Costs are allowed for one only.

[108] Section 85, Act of 1888.

[109] About 170 cases a year are remitted from one county court to another.

The other cases involve transfers from the county courts to the High Court and *vice versa*. If the defendant in a county court action puts in a counterclaim which exceeds in amount the limit of county court jurisdiction, he must, if he wishes to obtain a judgment for the whole amount, make application to the High Court for a removal of the action into the High Court, upon the granting of which the county court registrar will transmit the record to the higher court.[110] It sometimes occurs that in the exercise of its equitable jurisdiction [111] a county court will entertain an action in which it later appears that the total subject matter (usually the estate in question) exceeds the limit of jurisdiction. Then the county court must transfer the action to the Chancery Division of the High Court, unless one of the parties obtains from a judge of the Chancery Division an order specially authorizing the prosecution of the action in the county court.[112] Another ground of transfer, arising out of the gradual extension of county court jurisdiction, is the following.[113] If, in any action of contract, the plaintiff claims more than twenty pounds, or in any action of tort more than ten pounds, and the county court judge will certify that in his opinion some important question of law or fact is likely to arise, the defendant may upon giving security give notice that he objects to the action being tried in the county court; the effect of such notice will be to stay the proceedings in the county court, requiring the plaintiff to begin *de novo* by issuing a writ in the High Court. Similar to this, but wider, is a section of the act which provides that, after any action has been properly commenced in a county court, "if the High Court or a judge thereof shall deem it desirable that the action or matter shall be tried in the High Court," it may be removed by writ of *certiorari* into the High Court, subject to such terms as to costs, security or otherwise as are deemed

[110] Section 90, Judicature Act, 1873.

[111] See Section 67, Act of 1888.

[112] Section 68, Act of 1888.

[113] Section 62, Act of 1888, reproducing the effect of Sec. 39 of the Act of 1856 (19 and 20 Vict. c. 108), the jurisdiction having been raised from £20 to £50 by Sec. 1 of the Act of 1850 (13 and 14 Vict. c. 61).

proper by the High Court.[114] All of these events are of very rare occurrence.

But there are two sections in the act under which actions may be transmitted from the High Court to a county court and these are constantly being applied. The first refers to actions of contract begun in the High Court in which less than one hundred pounds is claimed, or in which the claim is reduced to less than one hundred pounds by any payment, admitted set off, or otherwise.[115] In such cases, if they are contested, either party may apply to have the cause remitted. The second is of far greater interest. It enacts that any person against whom an action of tort is brought in the High Court, no matter what amount is claimed, may make an affidavit that the plaintiff has no visible means of paying the defendant's costs in the event of a verdict for the defendant. If the master in the High Court is satisfied of this, then the action will be remitted to the county court most convenient for the parties, unless the plaintiff (1) gives full security for the defendant's costs, or (2) satisfies the master "that he has a cause of action fit to be prosecuted in the High Court."[116] The effect of remittance is to reduce considerably the cost of defending the action, as the scale of costs in the High Court is much higher than in the county court. This section acts as a very satisfactory check upon the bringing of purely speculative actions in the High Court, especially in negligence cases, as not only are the costs lower in county courts but verdicts also are on a more modest scale. Under these two sections cases to the average number of fifteen hundred a year are remitted from the High Court.[117]

To sum up: An action may be begun or tried where it will be most convenient; a summons or a warrant of execution may

[114] Sec. 126, Act of 1888. See, for an instance of this, Donkin v. Pearson [1911] 2 K. B. 412.

[115] Section 65, Act of 1888.

[116] Sec. 66, Act of 1888, reproducing Sec. 10, Act of 1867. For illustrations see Palmer v. Roberts, 29 Law Times Reports, 403 (Exch., 1873); Jennings v. London General Omnibus Company, 31 Law Times Rep. 266 (Exch. 1874); Edwards v. Mallon, [1908] 1 K. B. 1002, C. A.

[117] Of these about two hundred under Section 66.

be served in any district irrespective of the court of issue; and there is a power in the High Court and the county courts mutually to refer actions to each other upon proper occasion.

IV. Service of Process.

Service of process is a department of procedure in which the county court machinery is unique. In the High Court service is left to be effected by the parties or their agents—it is not undertaken for them by officers of the court. In many American courts there are employes of the court whose business it is to serve process, but in each case they must be set in motion by the interested party and that makes necessary a form of lubrication with which we are too familiar. In the county courts service is carried out automatically by officers of the court, and the parties have nothing to do with it except in special cases. A fixed fee is paid by the plaintiff when he enters his plaint, graduated according to the amount claimed and the number of defendants, which includes a charge for service of the summons and the court does the rest.[118]

1. A plaint is entered by leaving a praecipe at the court office and paying the fee. In the office a summons is filled out in duplicate to correspond with each praecipe, which gives the name, address and occupation of the parties, and copies of any accompanying affidavits or particulars are annexed.[119] At the close of each day all the summonses are turned over by the registrar to the high bailiff (where those officers are separate), whose duty it is to see that they are properly served.[120] He distributes them among his bailiffs so that the summonses are usually served or attempted to be served the day after issue. They must be served at least ten days before the return day: Service is effected by delivering the summons to the defendant personally or to some person apparently not less than sixteen years old at the

[118] A bailiff is forbidden to accept gratuities by Sections 50-51 of the Act, under which he will be promptly punished and also deprived of his certificate.

[119] O. 2 r. 4 a. The copies of particulars, if there are any, must be furnished by the plaintiff.

[120] O. 2 r. 4 b, r. 21; Section 35, Act of 1888.

defendant's place of dwelling or business.[121] The bailiff then endorses a memorandum of service upon the duplicate copy of the summons and this copy is returned to the registrar for the use of the court.

2. There are special provisions which allow variants from the general form of service.[122] Service may be accepted for the defendant by the defendant's solicitor, if the latter endorses upon the duplicate copy of summons a memorandum to that effect,[123] and this is frequently done, especially in cases where a company is sued for personal injuries. Service on the father, guardian or person with whom an infant defendant resides is sufficient, except that "the court may order that service made or to be made on the infant shall be deemed good service."[124] So a lunatic defendant may be served through his committee or the person under whose care he is.[125] A partnership, which may be sued in its firm name,[126] may be served through any one of its members or through the person in charge of its place of business within the district, even though the partners reside out of the district or out of the country.[127] So also a person carrying on business under a name or style other than his own, who may be sued by that name or style,[128] may be served either personally or through the person in charge of his place of business within the district.[129] In general, the "place of business" of a defendant is not deemed to be his for the purpose of service "unless he is the master or one of the masters thereof."[130] A sailor on board ship may be served through the person on board in charge of the vessel,[131] a soldier through any officer of his company,[132] a prisoner through the manager or head officer of the prison,[133]

[121] O. 7 r. 10.

[122] Most of these are identical with the High Court practice and are given here only for completeness.

[123] O. 7 r. 12.

[124] O. 7 r. 13.

[125] O. 7 r. 14.

[126] O. 3 r. 14.

[127] O. 7 r. 15. The place of business must be at least a branch, not merely an agency. See Worcester Banking Co. v. Fairbank, [1894] 1 Q. B. 784.

[128] O. 3 r. 17.

[129] O. 7 r. 16.

[130] O. 7 r. 10.

[131] O. 7 r. 18.

[132] O. 7 r. 19.

[133] O. 7 r. 20.

and an employee of any public asylum or prison through the gatekeeper.[134] If the defendant is working in any mine or other works underground, delivery of the summons to the engineman or other person apparently in charge of the mines or works is sufficient.[135] If he keeps his house or place of business shut up to prevent service the bailiff may affix the summons to the door,[136] and if the bailiff is prevented from personally serving the summons "by the violence or threats of the defendant or any person in conspiracy with him," it is sufficient service to leave it "as near to the defendant as practicable".[137] In actions to recover unoccupied land the service, if it cannot otherwise be effected, may be made by posting a copy of the summons in a conspicuous place on the property.[138] Service on a railway company may be made by delivering the summons to any secretary, station-master, or clerk at any station or office within the district;[139] any other company must be served at its registered office (under the Companies Act, 1908).[140] In all these cases if it appears that the summons did not in fact come to the knowledge of the defendant at least ten clear days before the return day the court has discretion to adjourn the hearing to a later day whether the defendant appears or not.[141] The defendant is entitled to demand ten days in which to prepare his case.

3. This time requirement is, however (as no English procedural rule is not), subject to exceptions. In any case where the defendant is about to remove out of the district in which he is sought to be served the plaintiff may upon affidavit obtain leave of the registrar to serve the summons less than ten days before the return day.[142] The judge has power in spite of this to adjourn the hearing to a later day, if he is of opinion upon the evidence that such a course is necessary or proper. He will do so, for instance, if it appears that the defendant was not in fact about to remove from the district; or if the plaintiff is using

[134] O. 7 r. 22.
[135] O. 7 r. 21.
[136] O. 7 r. 23.
[137] O. 7 r. 25; force is seldom offered a bailiff as he has power to arrest under Sec. 48, Act of 1888.
[138] O. 7 r. 24.
[139] O. 7 r. 27.
[140] O. 2 r. 26; O. 5 r. 5.
[141] O. 7 r. 28.
[142] O. 7 r. 9.

the rule in an attempt to obtain judgment prior to another suitor or prior to an impending bankruptcy.

4. When a defendant wilfully evades service by remaining away from his usual place of dwelling or business, or out of the district, the court will upon affidavit filed make an order for what is termed "substituted" service.[143] This almost invariably takes the form of an order for service by registered mail, or if that is not satisfactory, for service upon some one who is able to bring the summons to the defendant's notice, or in an extreme case by advertisement in a newspaper.

5. Default summonses must be personally served, as it is not fair to a defendant to enter judgment against him in eight days unless it is certain he has had notice. The rules for ordinary summonses do not therefore apply, and it is not sufficient to deliver the summons to any one but the defendant. Here too there is a special provision for cases where personal service is difficult. If the defendant evades actual service but the court can be satisfied upon affidavit that the summons must have come to his knowledge, an order will be made giving the plaintiff "liberty to proceed as if personal service had been effected."[144] This is the equivalent of substituted service of an ordinary summons, which is not permitted with a default summons, and it is granted only after all reasonable attempts to effect personal service have failed; the high bailiff must upon the plaintiff's request take such steps as are necessary to enable the plaintiff to show he is entitled to such an order.[145] Practically the same rules apply to a summons served upon a garnishee in a proceeding to attach debts: such a summons must also be personally served, except that in the case of a firm or company defendant the usual rules as to ordinary summons prevail.[146] Another case in which personal service is necessary is when the plaintiff is unable to give in his praecipe the present place of residence or of business of a proposed defendant who resides out of the district.[147]

[143] O. 7 r. 40.
[144] Sec. 86 (5), Act of 1888.
[145] O. 7 r. 33 a.
[146] O. 26 r. 3, 4.
[147] O. 5 r. 13 (9).

6. All interlocutory orders, and all judgments, may be served by mail, and upon the solicitor of the party,[148] except that judgments requiring the doing of some act or the delivering of any property must be personally served.[149]

7. The preceding paragraphs deal with the manner in which service may be made; there are many features of interest in the rules regarding the place where it may be made. In Section III are explained the facilities for service of process by the bailiff of a county court other than the court of issue. To this must be added the power of the court to order service even outside of England and Wales, in Scotland, Ireland or any foreign countries. In general, leave to do this will be granted, just as in the High Court,[150] when the subject matter of the action is land within the district,[151] or the administration of the estate of a deceased resident of the district,[152] or a contract made or broken within the district,[153] or when the defendant ordinarily resides or does business within the district, or when an injunction is sought as to some act to be done or stopped within the district,[154] or finally, when any person out of England and Wales is a necessary or proper party to any action properly brought in the district against some other person within England and Wales.[155] Leave of the court must be applied for, upon affidavit, and the order giving leave will fix a day on which the action is to be proceeded with, according to the distance at which the summons is to be served. If the defendant is neither a British subject nor in British dominions he cannot be served with a writ; in such cases he is served with a "notice of the summons" instead of with the

[148] O. 23 r. 7; O. 54 r. 2-4.

[149] O. 23 r. 9.

[150] O. 7 r. 41-49, corresponding to O. 11 of the Supreme Court rules.

[151] Tassell v. Hallen, [1892] 1 Q. B. 321, defendant in Scotland.

[152] He need not have actually died within the district.

[153] See Rein v. Stein, [1892] 1 Q. B. 753, C. A., defendant in Germany. From this part of the rule Scotland and Ireland are expressly excluded.

[154] See Société Générale de Paris v. Dreyfus Brothers, 29 Chan. Div. 239 (1885), defendant in France. The injunction will be granted only if the Court is satisfied it can be made effectual.

[155] See Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132, defendants in Holland and Brazil.

summons itself.[156] In granting leave the court is bound to have regard to the comparative cost and convenience of proceeding in the court of the district or at the home of the defendant, and this includes such considerations as the residence of material witnesses, the position of documents for convenience of discovery, the possibility of double litigation, *etc.*[157]

8. There are two special cases mentioned in the act in which service is possible outside the immediate district.[158] A bailiff may without special leave serve a summons or warrant within five hundred yards of the boundary of his court's district. This is intended to assist the plaintiff if there has been a slight error in the choice of his court, especially in country districts where the boundaries are not always easy to find. In the cities the liberty is not often used, as the district boundaries are more clearly marked. Again, a judge may order a bailiff of his court to serve its process in some other district, instead of sending the process to the other court for service. This is purely an emergency power: for instance, if a defendant known to a bailiff of the court has left the district to evade service, or is known to be leaving the country, it saves time and makes service much more certain to send a bailiff of the home court after him, than to proceed by correspondence with another court. In either of these cases the mere service would not *ipso facto* give the court jurisdiction—the case would have to come within the usual limits of jurisdiction as defined in Section 74.

9. In another place the act declares that "no misnomer or incorrect description of any person or place" shall vitiate any summons or service, "so that the person or place be therein described so as to be commonly known."[159] In obedience to this there is a rule, regarding the duty of a bailiff to find the defendant, which is in constant use. If the bailiff to whom a summons has been given for service ascertains in sufficient time before the return day that the defendant has removed from the

[156] O. 7 r. 47. See Hewitson v. Fabre, 21 Q. B. D. 6 (1888).
[157] O. 7 r. 42. See Williams v. Cartwright, [1895] 1 Q. B. 142, C. A.
[158] Sec. 77, Act of 1888.
[159] Sec. 73, Act of 1888.

address given on the summons to some other address within the district it is his duty to effect service of the summons as if the correct address had been given on the summons, and to endorse the new address upon the copy he returns to the court.[160] He is under the same duty if he finds that the registered address of a company has been changed from one address within the district to another.[161] For this reason a high bailiff will require his bailiffs to make several efforts to find the defendant before finally endorsing a definite return of non-service.[162]

10. This leads to the subject of endorsement of service. Where the methods of service are so various and such wide duties are laid upon bailiffs, it is natural that the endorsement should be important, and it is so regarded. The bailiff is required, if service has been personal, to endorse his copy accordingly; if it has not been personal he must endorse the specific mode of service so as to show it is valid under the rules,[163] and he must include in his endorsement "any statement made by the person to whom the summons was delivered or any other circumstance from which it may be inferred that the service of the summons has come to the knowledge of the defendant."[164] In either case he must state the time and place where service was effected. As mentioned above, if the defendant's address has changed he must endorse the new address. If there is any reason to suppose the person served was not the defendant, such doubts must be mentioned. If, finally, he is unable to serve the summons, he must endorse the reasons for his failure. His signature to the endorsement is necessary, and if he wilfully endorses a false statement he is guilty of a misdemeanor for which he will be discharged from office and prosecuted as for perjury,[165] as his signature is equivalent to an affidavit of service.

[160] O. 2 r. 22.

[161] O. 2 r. 26 (3).

[162] It is not necessary to add that no fees or gratuities are payable for extra efforts of this sort.

[163] See O. 7 r. 16 a.

[164] O. 2 r. 23.

[165] Sec. 78, Act of 1888.

On the back of an ordinary summons is a printed form of endorsement leaving space in which the bailiff writes the details he is required to give. Rubber stamps are not used, as the endorsement in all cases must state the specific facts—for instance, whether the person served was a male or female. The form is as follows:

"Served the summons of which this is a true copy, on the day of 1915, at by delivering the same to the defendant personally, *or* to (apparently not less than sixteen years old) at the dwelling house *or* place of business of the defendant, who promised to give the same to defendant that day. (If the summons have been served in any other manner pursuant to the provisions of Order VII, the mode of service must be stated in the endorsement.)"

"A summons, of which this is a true copy, was served by me on the day of 1915, at by delivering the summons to a partner in the defendant firm *or* who carries on business in the name or style of the defendant firm *or* being the principal place of business of the defendant firm, by delivering the same to a person apparently not less than sixteen years old, who appeared to have the control or management of the business there."

In the case of default summonses the variants are not given, as only personal service is sufficient.

11. When a return of non-service is made upon an ordinary summons, the high bailiff is required forthwith to notify the plaintiff of the reasons why service could not be effected,[166] so as to enable him to proceed further. This notice is sent by mail. If, on the other hand the summons was delivered to some one at the place mentioned in the summons, but from a statement made by that person it appears "doubtful whether the court will be satisfied that the service of the summons has come to the knowledge of the defendant before the return day," the high bailiff must forthwith send the plaintiff "notice of doubtful service,"[167] in the following form:

"Take notice that the summons in this action was left at the address given by you and (*here insert the bailiff's return of service as endorsed on the summons*). You must therefore be prepared if

[166] O. 2 r. 24.
[167] O. 2 r. 25.

the defendant does not appear at the hearing, to satisfy the court that the summons has come to the knowledge of the defendant before the return day."

A very common occasion for the use of this notice is when a defendant shop-keeper has sold his business to some one who keeps up the old trade name; the new owner might be served and would deny that he had anything to do with the defendant. Or, after a person had dropped out of a partnership, a summons against him might be served on one of the remaining partners or on their former manager. In such cases the statement made by the person served would appear in the bailiff's endorsement, and the high bailiff, who must inspect all the endorsements before returning the copies of summons to the registrar, would send the notice required by the rule. If the summons had been sent to a foreign court for service, under the procedure mentioned in Section II then the home registrar, upon receiving back the endorsed copy of summons, would be required to send out a similar notice in case of doubtful service.[168] A similar notice is expressly required to be sent when a company defendant is served at the address given in the summons, which does not appear in fact to the bailiff to be the registered address required by the statute.[169]

As to default summonses additional rules obtain. Within two days after a bailiff has served a default summons the high bailiff must notify the plaintiff.[170] This is because a plaintiff must, if the defendant does not give notice of defense, enter up judgment within two months from the date of service.[171] On the other hand, in case of non-service of a default summons, the high bailiff must notify the plaintiff at the end of a month why the summons has not been served, and must send a similar notice at the end of each month during which it remains in force and unserved. Its life is twelve months, whereas an ordinary summons is good only until the return day named in it, after which it must be reissued.

[168] O. 2 r. 6.
[169] O. 2 r. 26 (4).
[170] O. 2 r. 31.
[171] Sec. 86 (1), Act of 1888.

12. After receiving a notice of non-service of his summons, a plaintiff has several courses open to him. He may go to the high bailiff and complain that there is not sufficient reason why the summons should not have been served. But if there has been a failure to serve, it will more usually have been the plaintiff's own fault. If the non-service was by reason of any mis-statement or insufficient statement of the defendant's name, address, or occupation, or because the defendant had removed before the plaint was entered, then if there is still sufficient time before the return day the plaintiff may amend his plaint to correct the error and pay a small fee for serving the summons again.[172] If there is not sufficient time before the return day the plaintiff must enter a new plaint, unless he can show the error was not due to negligence on his part.[173] If he was not negligent or if for any other good reason, the summons is not served before the return day, he may within three months procure the issuance of a "successive" summons, without paying a new fee;[174] on a default summons a successive summons will issue if the original in spite of reasonable efforts, remains unserved for twelve months.[175]

13. In any case where there has been a notice of doubtful service or where the defendant was not personally served, if the defendant does not appear at the hearing, the court may, if it appear just, order the action to be struck out and require a new plaint to be entered, or order that a successive summons issue, or order that the hearing be adjourned to another day (with notice to the defendant) to hear further evidence as to whether the defendant actually had knowledge of the summons at least ten days before.[176] Even if the defendant does not appear he is entitled to raise this objection later.

14. The chief difference between an original summons and a successive summons is in the person entitled to serve it. The

[172] O. 7 r. 5 a (1); O. 7 r. 30 a.

[173] O. 7 r. 6 (2).

[174] O. 7 r. 6 (1), (4).

[175] O. 7 r. 30.

[176] O. 7 r. 11; O. 2 r. 26 (4). Judgment will not be given against an absent defendant unless it is clear he had knowledge of the action.

original of an ordinary summons is invariably handed to a bailiff for service; only in cases where there is such difficulty as to require the issuance of a successive summons is the plaintiff himself permitted to effect service. This rule is a result of a desire to eliminate needless complications in keeping records of the summonses; the great bulk of them are for very small amounts, and it is much better to have them all served by bailiffs who understand the rules than by a lot of plaintiffs who might or might not understand them and, being without solicitors, would require constant advice, correction and instruction.[177] But after a bailiff has failed, the plaintiff is entitled to try, if he chooses, with a successive summons. He must get leave of the court and the summons may then be served by him or by some clerk or secretary in his permanent employ, or by his solicitor or some employee of the solicitor; the usual return of service must be endorsed, and the copy of summons, together with an affidavit of service, must be deposited with the registrar.[178] When this is done the solicitor must prepare the necessary copies of summons and particulars, and have them duly sealed before service.[179] No person under the age of sixteen years is permitted to effect service,[180] and the affidavit of service, besides stating that the process server was at least sixteen, must state when, where, how, and by whom the service was effected.[181]

15. In respect to default summonses, as distinct from ordinary summonses, there is a slightly different rule. The ordinary summons must go in the first place to a bailiff; the default summons may, however, if so requested by the plaintiff,[182] be served by the plaintiff in the first instance.[183] This may be because the personal service of a default summons required by the act is made more certain when fortified by the plaintiff's affidavit of

[177] This explains why an exception is made, where the claim is over £50, permitting the plaintiff to serve the original summons. O. 22 a. r. 3.

[178] O. 7 r. 29 a.

[179] O. 54 r. 5.

[180] O. 54 r. 5 a.

[181] O. 19 r. 12.

[182] O. 5 r. 9.

[183] O. 7 r. 33.

service; but in practice it must be confessed that the chief reason for service by the plaintiff (or, really by his solicitor) is because the solicitor gets a good fee for doing it.[184] When the amount claimed is larger than the average and a solicitor is employed it is natural that he should prefer to serve the summons just as he would if the action were in the High Court. There are a few other cases when the plaintiff may, by leave of the court, serve the original summons. These are when an ordinary summons is issued for more than fifty pounds;[185] or when it is issued for service out of the district and the plaintiff cannot state the defendant's address;[186] in the case of a judgment summons;[187] and finally in the case of a garnishee summons.[188] But, of course, these special cases together are very small in number compared to the number of summonses served in the regular way by the bailiffs of the court; not one summons in twenty is served otherwise than by the court itself.

(To be concluded.)

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[184] The fee for service by bailiff is only one shilling; but the allowance for a solicitor is five shillings or more, according to the claim. This works out quite profitably when there is a batch to be served together—one of many absurdities of the "apothecary's bill" system of taxing costs. In 1913, out of 244,500 default summonses issued, 66,000 were served by solicitors. Return of County Courts (Plaints and Sittings), 1913; H. C. Paper 420, 1914.

[185] O. 22 a. r. 3.

[186] O. 5 r. 13 (9).

[187] O. 25 r. 31.

[188] O. 26 r. 3.